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JUL - 3 2002

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JOHN CHARLES KENNEY,
Plaintiff

v.

JAKE MENDEZ;
JESUS "JESSE" GONZALEZ;
JAMES "JIMMY" SCARBOROUGH; and
KELLY M. KEISER,
Defendants

:
:
:
: Civil No. 1:CV-00-2143
: (McClure, J.)
: (Blewitt, M.J.)
:
:
:

**DEFENDANTS' BRIEF OPPOSING PLAINTIFF'S
OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT**

This is a Bivens action by inmate John Charles Kenney who claims he was assaulted by staff at USP Allenwood on September 29, 1999. In response to the complaint, defendants provided exhibits and an argument to establish, inter alia, that Kenney failed to exhaust his administrative remedies.

On June 17, 2002, Magistrate Judge Blewitt issued a Report recommending that defendants' motion for judgment on the pleadings be granted because Kenney is barred from proceeding in federal court due to his failure to exhaust.

Kenney has now filed objections to the Magistrate Judge's Report. Specifically, Kenney again argues that he did exhaust because he submitted administrative remedies to each level. He also believes the administrative remedy requirement has been fulfilled because the grievances were submitted prior to his

filing the instant Bivens action with the Court. However, as stated by Magistrate Judge Blewitt, "[w]hile the Plaintiff submits proof that he has, in fact, proceeded through each of the required administrative steps, he does not dispute that he failed to commence the process until over a year after the incident. Nor does he dispute that consideration of his requests was rejected at every level for being untimely." Report at 4.

This Court is required to make a de novo determination of those portions of the Magistrate Judge's Report to which Kenney has objected. 28 U.S.C. § 636(b)(1)(C); see Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). However, it is permitted by statute to rely upon the Magistrate Judge's proposed recommendations to whatever extent the Court, in the exercise of sound judicial discretion, deems proper. United States v. Raddatz, 447 U.S. 667, 676 (1980). See also Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984).

In the instant case, the Magistrate Judge's Report is free from clear error and is not contrary to law. The Magistrate Judge correctly determined that an inmate filing a federal lawsuit must exhaust his administrative remedies "even if the ultimate relief sought is not available through the administrative remedy procedures." Report at 3 (citing Ahmed v. Sromovski, 103 F. Supp. 2d 838, 842-843 (E.D. Pa. 2000)). Thus,

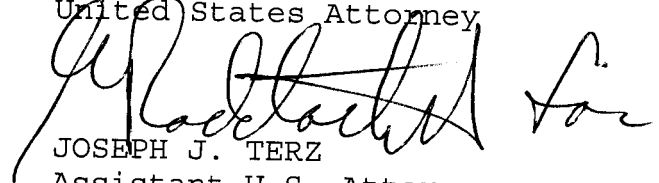
in light of the lack of error on the part of the Magistrate Judge, the Report should be adopted.

Conclusion

For the reasons stated above, this Court should adopt the Report of the Magistrate Judge as its own and grant the relief recommended.

Respectfully submitted,

THOMAS A. MARINO
United States Attorney

A handwritten signature in black ink, appearing to read "J. Terz", is written over the typed name of Joseph J. Terz.

JOSEPH J. TERZ
Assistant U.S. Attorney
MICHELE E. LINCALIS
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Date: July 3, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

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Plaintiff	:	
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JESUS "JESSE" GONZALEZ;	:	
JAMES "JIMMY" SCARBOROUGH; and	:	
KELLY M. KEISER,	:	
Defendants	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

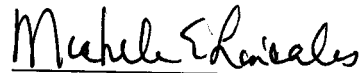
That this 3rd day of July 2002, she served a copy of the attached

DEFENDANTS' BRIEF OPPOSING PLAINTIFF'S
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by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

ADDRESSEE:

John Charles Kenney
Reg. No. 05238-041
U.S. Penitentiary
P.O. Box 2099
Pollock, LA 71467


MICHELE E. LINCALIS
Paralegal Specialist